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No.

IN THE

Supreme Court of the United States

October Term, 1987

GAMAL S. HENEIN,

Petitioner,

vs.

SAUDI ARABIAN PARSONS LIMITED,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

The Royal Commission for Jubail & Yanbu, a commercial agency of the government of the Kingdom of Saudi Arabia, was formed to work with respondent Saudi Arabian Parsons Limited, an unincorporated association organized under the laws of the Kingdom of Saudi Arabia and comprised of corporations organized in the United States, to construct an industrial city bordering on the Red Sea. Petitioner Gamal S. Henein was employed by respondent to work as a civil engineer on the industrial city project. An officer of the Royal Commission for Jubail & Yanbu demanded that respondent terminate petitioner and turn over his passport. Respondent thereafter terminated petitioner for cause, disallowing the payment of all employment benefits which would have been payable had the termination not been "for cause."

The questions presented are:

[1] Whether there exists, consonant with the plurality opinion in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), a commercial exception to the "act of state" doctrine.

(a) Whether the act of state doctrine or any other doctrine precludes a court from determining whether a private employer has breached its contractual obligations to an employee, when the employer excuses its breach by claiming to be acting under orders from a foreign state.

(b) Whether the demands of an officer of a commercial agency of a foreign government must as a matter of law command the deference accorded an act of a foreign state.

(c) Whether the act of state doctrine precludes inquiry into the motivations for an act of state, as well as its validity.

(d) Whether an interlocutory act of a foreign state which may in fact have been ultimately repudiated is to be accorded deference pursuant to the act of state doctrine.

[2] Whether the United States Court of Appeals for the Ninth Circuit improperly determined that an intent to deceive is a necessary element of the doctrine of equitable estoppel.

[3] Whether the United States Court of Appeals for the Ninth Circuit, in its summary adjudication of petitioner's negligence claim, committed reversible error by excluding as inadmissible hearsay the admissions of an agent of the project operated by respondents, which admissions raised a triable issue of fact regarding the negligent driver's status as an employee of respondent.

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GAMAL S. HENEIN,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner Gamal S. Henein respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the case of Henein v. Saudi Arabian Parsons Limited, No. 85-6128 on said Court's docket.

THE PARTIES

The parties to the proceedings below were the petitioner Gamal S. Henein and the respondent Saudi Arabian Parsons Limited.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet reported

and was rendered on June 5, 1987. The opinion[1] is reprinted as Appendix A hereto, page A-1, *infra*. The order of the United States Court of Appeals for the Ninth Circuit denying rehearing is reprinted as Appendix B hereto, page B-1, *infra*.

The summary judgment of dismissal issued by the United States District Court for the Central District of California has not been reported. It is reprinted as Appendix C hereto, page C-1, *infra*.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was dated June 5, 1987. The Court of Appeals denied petitioner's petition for rehearing on July 8, 1987.

On October 6, 1987, Justice O'Connor ordered that the time for filing this petition for writ of certiorari be extended to and including November 5, 1987. A copy of said order is reprinted as Appendix D hereto, page D-1, *infra*.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Royal Commission for Jubail & Yanbu (the "Royal Commission"), a commercial agency of the government of the Kingdom of Saudi Arabia, was formed to work with respondent Saudi Arabian Parsons Limited ("respondent"), an unincorporated association organized under the laws of the Kingdom of Saudi Arabia and comprised of

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1 Hereinafter referred to as "Opinion."

corporations organized in the United States, to construct an industrial city bordering on the Red Sea. "CR" at pages 66-67.[2]

Petitioner Gamal S. Henein ("petitioner") is a citizen of the United States of America who, pursuant to a written employment agreement, was to perform services for respondent as a principal civil engineer in Saudi Arabia from May 20, 1980 to November 20, 1981.[3]

Prior to petitioner's departure for Saudi Arabia, respondent gave petitioner two informational pamphlets which, among other things, apprised petitioner of what to expect in Saudi Arabia and what he might wish to bring with him. Of particular significance is the fact that respondent's informational pamphlets advised petitioner that he could bring prescription medicine with him into the country as long as he brought the prescription itself as well. Opinion at page A-6; CR at page 398. Petitioner did so.

On May 14, 1981, during the course of his employ with respondent, petitioner was involved in an accident when the automobile he was driving

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[2] References to the record, denominated herein as "CR," are to the Appellant's Excerpts of Clerk's Record filed with the United States Court of Appeals for the Ninth Court.

[3] In its opinion the Ninth Circuit misstated the prospective time period of petitioner's contractual performance. Compare Article I of the employment agreement, reprinted at page D-1, infra, to the court's statement of the contractual term, reprinted at page A-6, infra.

was hit by a truck.[4] Petitioner was hospitalized in Saudi Arabia for serious injuries. Due to the gravity of his injuries he was soon thereafter transported to Los Angeles, where his hospitalization continued. Opinion at page A-7.

During the Saudis' investigation of petitioner's automobile accident, police found a prescription drug in petitioner's briefcase. According to the declarations of three former employees of respondent, a Captain Yusuf Hijr, the Security Coordinator for the Royal Commission which served as liaison between respondent and the government of the Kingdom of Saudi Arabia, demanded that, in light of petitioner's possession of a prescription drug, respondent terminate petitioner and turn over his passport. Opinion at page A-9; CR at pages 97-106. Respondent did so.

In fact, while petitioner was recuperating in Los Angeles, petitioner received a communication from respondent stating that his employment was terminated *for cause*, thereby depriving petitioner of certain benefits to which he would otherwise have been entitled. Opinion at page A-7; CR at pages 147-150.

In order to effectively deprive petitioner of any and all employment benefits, respondent must necessarily have deemed the termination of petitioner to be "for cause" pursuant to section 12.1.A of the employment agreement; if petitioner was considered to be terminated for "any other lawful reason," he would have been, pursuant

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[4] Conflicting evidence was presented to the courts below relative to the truck driver's status as an employee of respondent. See discussion, infra.

to section 12.2 of the employment agreement, considered to have satisfactorily completed his work and therefore entitled to employment benefits. Petitioner's work performance itself was not called into question upon his termination.

Section 12.1.A of the employment agreement set forth the grounds upon which an employee of respondent could be terminated for cause. Section 12.1.A stated in relevant part:

> SAPL, at its discretion, may at any time terminate Employee's employment hereunder for cause, such as . . . illegal use of drugs . . . failure to comply with the local customs or laws of Saudi Arabia . . . or conduct of any dependent or guest of Employee in the country of the Employment which is detrimental to SAPL . . . .[5]

Respondent terminated petitioner "for cause" based on its position that Captain Hijr spoke for the government of the Kingdom of Saudi Arabia, and that in said capacity he had demanded petitioner's termination and banishment for petitioner's "failure to comply with the local

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[5] Section 12. of the employment agreement is reprinted in its entirety commencing at page E-2, infra. Significantly, the Ninth Circuit misstated said section in its Opinion, asserting that petitioner could be terminated for cause for his own conduct that would be detrimental to respondent, rather than for such conduct of "any dependent or guest" of his. Compare Section 12.1.A, reprinted in full at page E-2, infra, to the Ninth Circuit's recitation of said contractual term, reprinted at page A-6, infra.

customs or laws of Saudi Arabia"; namely, petitioner's possession of a prescription drug. CR at page 68. In response, petitioner offered respondent proof that the Saudi government itself had issued to petitioner a visa so that he might re-enter the country, thus rebutting petitioner's claim that there was an officially-sanctioned "banishment." *See* Opinion at page A-9 at n.3; CR at pages 211, 245. Petitioner also vigorously contested to respondent the alleged impropriety of his possession of a prescription drug. Petitioner's appeal of his termination was to no avail.

By amended complaint dated January 3, 1983, petitioner complained against respondent in the United States District Court for the Central District of California, seeking declaratory relief and damages for breach of contract, negligence, misrepresentation, defamation and intentional infliction of emotional distress.[6]

Petitioner's breach of contract claim was premised on respondent's decision to terminate petitioner for cause and deny him any award of employment benefits. On July 9, 1984 respondent moved for summary adjudication of said claim pursuant to Rule 56(d), Fed. R. Civ. P., on the grounds that petitioner's termination for cause was premised upon Captain Hijr's demand that respondent turn over petitioner's passport and

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[6] The viability solely of petitioner's claim for damages for breach of contract and negligence are presently at issue; the discussion will be limited accordingly.

terminate his employ. Respondent's motion for summary judgment was granted and a partial judgment of dismissal was entered by the District Court on July 31, 1984.

Petitioner's negligence claim arose out of his collision with the truck and was based on his allegation that the truck was driven at the time of the collision by an employee of respondent. In support of his allegations petitioner presented to the District Court his own declaration, in which he attested that officers of the project operated by respondent had stated to him that petitioner's co-worker was operating the vehicle and was responsible for the collision. CR at pages 445-46. The District Court deemed petitioner's factual showing to be inadmissible hearsay and, after granting respondent's June 24, 1985 motion for summary adjudication of said claim, entered a final judgment of dismissal on July 17, 1985.

The Ninth Circuit affirmed the District Court's judgment of dismissal. In addressing petitioner's breach of contract claim, the court concluded that because of Captain Hijr's order to terminate petitioner, respondent was entitled to discharge petitioner for cause. The court's ruling was premised on the declarations of three former employees of respondent who attested to the import of Captain Hijr's order. CR at pages 97-106. Though the Court found that the stated *reasons* for Captain Hijr's order, as set forth in the declarations, were inadmissible as hearsay (Opinion at page A-10), the Court ruled that the very fact that the order was communicated was certainly not hearsay and, rather, conclusive evidence of the justifiability of petitioner's termination *for cause*.

In this respect the Court, in its affirmance of the summary dismissal below, did not deem as a triable issue of fact the question whether Captain Hijr did speak for the Saudi government. Moreover, the Court did not question, or deem questionable, the role of the Saudi government (assuming, *arguendo*, the words of Captain Hijr were the words of the government) in its commercial dealings with respondent, and its attendant commercial obligation to petitioner. Nor did the Court question the finality of Captain Hijr's order of banishment, despite petitioner's presentation of evidence (acknowledged by the Court; *see* Opinion at page A-9, n.3) that the Saudi government itself had re-issued petitioner a visa for his re-entry into the country.

The Ninth Circuit ultimately refused to premise respondent's decision to terminate petitioner upon the "act of state" doctrine so fully briefed by both parties in the District Court and on appeal. The Court, however, deemed respondent's justification for terminating petitioner for cause to be a function of Captain Hijr's order. This apparent self-contradiction first appears at footnote 5 of the Court's Opinion:

> The parties devote considerable attention to the question whether the banishment order constitutes an "act of state" and whether the district court should have considered disputed evidence about the accuracy of the Saudi government's determination. These matters are completely irrelevant to this dispute. Even if Henein had conclusively established that the Saudi government's orders

> were incorrect and that he was not in possession of illegal drugs, SAPL would still have been bound by the Saudi decree and entitled to discharge Henein under the express terms of the employment contract.

The apparent contradiction is sharpened by the Court's subsequent statement, despite its earlier ruling that the *reasons* for Captain Hijr's banishment and termination order were inadmissible, that

> SAPL presented uncontroverted evidence that Henein had been banished for violation of the local laws and customs of Saudi Arabia and that he was discharged for this reason. The act of the Saudi government thus constitutes a proper reason for termination under the contract.

Opinion at A-14. The Court thus found respondent to be justified in terminating petitioner for cause.

The Ninth Circuit thereupon addressed the issue whether, by virtue of respondent's misrepresentations in its informational pamphlets, respondent should be estopped from relying on the orders of Captain Hijr. The court rejected the estoppel claim, concluding that petitioner presented no evidence that respondent "knew or should have known that its representations concerning prescription drugs were untrue." Opinion at A-14.

The Ninth Circuit thereafter affirmed the District Court's dismissal of petitioner's negligence

claim, agreeing with the District Court's ruling that petitioner's declaration was inadmissible as hearsay, notwithstanding petitioner's claim that the statements of officers of the project were admissible as admissions of respondent.

REASONS FOR GRANTING THE WRIT

I.

Introduction

This case provides the Court with the opportunity to delimit the "act of state" doctrine and thereby define the courts' constitutional power to legally question foreign acts of state. This Court's decision in *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964), sets forth the constitutional import of the questions presented herein as follows:

> The act of state doctrine does . . . have "constitutional" underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations.

II

The Ninth Circuit's Flawed Application Of The Act Of State Doctrine Only Intensifies The Confusion And Unresolved Problems Surrounding The Doctrine's Applicability To Commercial Dealings.

Amidst the ever-increasing involvement of foreign states in the field of commerce, the paucity of decisions of this Court concerning the judicial deference to be accorded the commercial dealings of those foreign states has caused confusion and conflict among the circuits. Application of the "act of state" doctrine, the principal vehicle by which courts grant deference to foreign acts of state, is the paradigm of this confusion.

> [I]f the Foreign Sovereign Immunities Act is a tangled web of statutory ambiguities, the act of state doctrine is an airy castle.

Callejo v. Bancomer, S.A., 764 F.2d 1101, 1113 (5th Cir. 1985).

In the case at bar, the Ninth Circuit applied the act of state doctrine expansively, while disclaiming any intent to apply the doctrine at all: it refused to permit inquiry into whether a private employer breached its contractual obligations to its employee, because the employer claimed to be acting under orders from a commercial agency of a foreign state.

In its traditional formulation the act of state doctrine precludes the courts of this country "from inquiring into the validity of the public acts of a recognized foreign sovereign power committed

within its own territory." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964). The classic statement of the doctrine is found in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897):

> Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves.

The courts grant deference to the Executive Branch in their adherence to the belief that notions of comity among nations require that the Executive have exclusive power over the conduct of relations with other sovereign powers.

> [T]he sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign . . . the questions to which such wrongs give birth are rather questions of policy than of law . . . they are for diplomatic, rather than legal discussion, are of great weight, and merit serious attention.

The Schooner Exchange v. M'Faddon, 7 Cranch 116, 146, 3 L.Ed. 287 (1812), *quoted in First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 762 (1972).

The act of state doctrine is not, however, inflexible. Because the doctrine's "continuing

vitality depends on its capacity to reflect the proper distribution of functions between the judicial and political branches of the Government on matters bearing upon foreign affairs," *Sabbatino*, 376 U.S. at 428, its application and effect must remain a function of the degree to which our foreign relations are implicated by any act of a foreign state. *Id.* The act of state doctrine has therefore been restricted to those governmental acts in which the sovereign's interest *qua* sovereign is involved. *See* Mann, *The Sacrosanctity of the Foreign Act of State*, 59 L.Q. Rev. 42 (1943).

The need for a restrictive application of the act of state doctrine was recognized by this Court in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976), where a plurality refused to extend the doctrine to include the repudiation of a purely commercial obligation owed by a foreign state or by one of its commercial instrumentalities.

> [W]e are in no sense compelled to recognize as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary . . . we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognized as an act of state and immunized from question in our courts.

Alfred Dunhill, 425 U.S. at 697-98.

Because this "commercial exception" to the act of state doctrine only commanded a plurality of this Court, however, circuit courts have operated in a cloud of confusion in their application of the doctrine. Conflict among the circuits has been the unfortunate result.[7] It was the potential for this very conflict which, for fear of the resulting disunity in the field of foreign affairs, led this Court to establish the act of state doctrine.

Because the degree of foreign government involvement which must be present prior to invocation of the act of state doctrine varies with the particular facts and circumstances of each case,

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[7] The Second Circuit, in Hunt v. Mobil Oil Corp., 550 F.2d 68 (2nd Cir. 1977), cert denied, 424 U.S. 984 (1974), refused to apply the act of state doctrine where the sovereign was sued upon its commercial activity. See Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300 (2nd Cir. 1981), cert denied, 454 U.S. 1148 (1982)(commercial activity exception applied where Nigerian government breached cement-purchase contracts). From the Ninth Circuit there have issued conflicting decisions: compare, e.g., Northrop Corp. v. McDonnell Douglas Corp., 705 F.2d 1030, 1048 n.25 (9th Cir.), cert. denied, 464 U.S. 849 (1983) (existence of commercial exception), to International Association of Machinists and Aerospace Workers v. OPEC, 649 F.2d 1354, 1360 (9th Cir. 1981), cert. denied, 454 U.S. 1163 (1982) (a presence of a commercial component does not create a commercial activity exception). The Fifth Circuit is also in a state of complete confusion, having issued conflicting decisions within its own jurisdiction. See Callejo v. Bancomer, S.A., 764 F.2d 1101, 1115 n.17 (5th Cir. 1985) ("The articulation in Dunhill of a commercial activity exception to the act of state doctrine has engendered considerable debate"), and cases cited therein.

Sabbatino, 376 U.S. at 428, application of the doctrine requires a case-by-case analysis of the extent to which the separation of powers concerns (which are at the heart of the doctrine) are implicated by the particular governmental action at issue. *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 316 n.38 (2d Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

In this case the Ninth Circuit's application of the act of state doctrine in a commercial setting was realized by way of summary judgment. The court's failure to weigh the considerations which bear on the applicability of the doctrine will only intensify the confusion of the courts and add to the disunity in their application of the doctrine.[8] Moreover, summary adjudication of the many factual considerations implicit in a decision to apply the doctrine in a commercial setting is not

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[8] Despite the Ninth Circuit's disclaimer of its application of the act of state doctrine (see footnote 5 of its Opinion, reprinted in Appendix A at page A-13; see also Statement Of The Case, supra, at page8), there can be no doubt that the court did indeed apply the doctrine; it granted judicial deference to the Saudi official's termination order without questioning the order's lawfulness or the reasons for the order. See footnote 5 of the court's Opinion, as well as its Opinion at page A-14 ("The act of the Saudi government . . . constitutes a proper reason for termination under the contract.") This is by definition the very import of the act of state doctrine. In fact, it is an example of the doctrine's misguided application in a commercial setting. See discussion, infra.

only in and of itself erroneous,[9] but will add to the circuit courts' conflict over the proper effect of those considerations as well.

A. The Act Of State Doctrine Must Not Preclude Adjudication Of The Private Commercial Consequences Of A Foreign Act Of State.

Several circuits have held that the act of state doctrine does not preclude judicial inquiry into the propriety of a private concern's commercial reaction to a foreign act of state.

> The act of state doctrine only precludes judicial inquiry into the legality, validity, and propriety of the acts and motivations of foreign sovereigns acting in their governmental roles within their own boundaries; [footnote omitted] it does not preclude judicial resolution of all commercial consequences stemming from the occurrences of such public acts.

Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1380-81 (5th Cir. 1980), *cert. denied*, 474 U.S. 995 (1985); *Allied Bank International v. Banco Credito Agricola De Cartago*, 757 F.2d 516, 521 (2nd Cir. 1985); *see Airline Pilots Association, International, AFL-CIO v. TACA International Airlines, S.A.*, 748 F.2d 965, 971 (5th Cir. 1984), *cert. denied*, 471 U.S. 1100 (1985) ("We do not

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[9] Summary judgment is only proper when there is no genuine issue as to any material fact. Planet Insurance v. Mead Reinsurance Corp., 789 F.2d 668, 670 (9th Cir. 1986).

adjudicate the validity of Article 110, §4 of the Salvadoran Constitution, nor do we comment on El Salvador's regulatory practices and policies involving public service companies. That is not our prerogative. We do adjudicate, however, the legality of TACA's response to the governmental directive it received.")

In the case at bar the Ninth Circuit, by way of summary judgment, insulated respondent from honoring its contractual obligations to petitioner. Accepting at face value the order of Captain Hijr that respondent banish and terminate petitioner, yet without addressing the cause for said order, the Ninth Circuit deemed that as a matter of law respondent was justified in terminating petitioner *for cause*, thus disallowing the payment of employment benefits to which petitioner would otherwise have been entitled.

The Ninth Circuit, by its decision below, drew the bounds of deference to be accorded an act of state (assuming, *arguendo*, an act of state did occur) much too broadly, insulating a private concern from any and all commercial obligations in any way related to the foreign act itself. The purported act of state was an order of termination; the commercial consequence was a termination *for cause* and a summary denial of employment benefits under private contract. If the Ninth Circuit's decision is allowed to stand, the potential effects of the act of state doctrine may far exceed the bounds already drawn to serve the doctrine's intent.

B. The Demands Of An Officer Of A Commercial Agency Of A Foreign State Cannot As A Matter Of Law Command The Deference Accorded An Act Of A Foreign State.

This Court has long recognized that, prior to according any deference to an act of state, there must necessarily be an analysis of whether in fact an act of state did occur. *First National City Bank v. Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 623-627 (1983). The goal of such analysis is to discern whether in fact the voice that would be accorded deference is indeed that of the sovereign, and not merely that of an individual who speaks only for himself. Furthermore, and in light of the question whether a foreign state's commercial acts are to be accorded any deference at all, there must be some analysis of whether the foreign authority is governmental as opposed to purely commercial. *Alfred Dunhill*, 425 U.S. at 693-94.

If there is to be a commercial exception to the act of state doctrine, then the act of a foreign commercial authority as such is to be accorded no deference at all. In *The "Gul Djemal,"* 264 U.S. 90 (1924), *quoted in Alfred Dunhill*, 425 U.S. at 693 n.9, this Court questioned whether the master of a steamship owned and operated for commercial purposes by the Turkish Government would be accorded the sovereign immunity commanded by the foreign government itself. In holding that the officer of the Turkish Navy would not be granted such status because his representation of his government as master of a commercial ship did not in and of itself suggest that he was entitled to

represent the sovereign in other capacities, this Court wrote as follows:

> "The Anne, 3 Wheat. 435, 4 L.Ed. 428, reaffirmed by The Sao Vicente, 260 U.S. 151, 42 S.Ct. 15, 67 L.Ed. 179, is enough to show that the immunity could not have been successfully set up by a duly recognized consul, representative of his sovereign in commercial matters, in the ordinary course of his official duties, and there seems no adequate reason to presume that the master of the Gul Djemal had any greater authority in respect thereto. Although an officer of the Turkish Navy, he was performing no naval or military duty, and was serving upon a vessel not functioning in naval or military capacity but engaged in commerce . . . . He was not shown to have any authority to represent his sovereign other than can be inferred from his position as master . . . ."

The "Gul Djemal," 264 U.S. at 95.

In the case at bar the Ninth Circuit summarily held that the order of Captain Hijr, the Security Coordinator for the Royal Commission, the commercial agency of the Saudi government which worked jointly with respondent in the construction of an industrial city, was automatically to be

accorded the deference of an act of state.[10] By way of its summary adjudication the Ninth Circuit deferred to the order of an officer of a commercial agency and thereby insulated respondent, a private and related commercial association, from honoring its contractual obligations to petitioner. Based solely on the order of Captain Hijr, respondent was permitted to terminate petitioner for cause, thereby disallowing the payment to petitioner of employment benefits to which he would otherwise have been entitled.

The Ninth Circuit failed to question the sovereign authority of Captain Hijr, though it was obligated to do so. Assuming the Court had met this obligation, however, and had the Court concluded, after consideration of the relevant facts, that Captain Hijr did speak for the Saudi government, then it was incumbent upon the Court to weigh the circumstances of the Saudi involvement and determine whether said involvement was of a political or commercial nature. The answer to these questions would have determined the applicability of the act of state doctrine. However, the Ninth Circuit, by its summary judgment, asked none of these questions. Its failure to do so will only intensify the confusion and conflict among the circuits.

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[10] It was only Captain Hijr's oral order itself, introduced by way of the declarations of three of respondent's former employees, which evidenced the purported act of state. All other allegations were excluded as inadmissible hearsay. See Opinion at page A-10.

C. The Act Of State Doctrine Does Not Preclude Inquiry Into The Motivations For An Alleged Decision Of A Foreign State In Order to Determine Whether The Decision Was Commercial Or A Genuine Act Of State.

Though it is well established that the act of state doctrine precludes inquiry into the *validity* of the public acts which a recognized foreign sovereign power committed within its own territory, *Sabbatino*, 376 U.S. at 401, the circuit courts are in great disagreement whether the doctrine precludes inquiry into the *motivations* for a purported public act.[11]

While, for example, the Ninth Circuit has ruled that the act of state doctrine prohibits inquiry into the motivations for, as well as the validity of, acts of foreign states, *DeRoburt v. Gannett Co.*, 733 F.2d 701, 703 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985) (due to an unwillingness to question the nobility of a foreign nation's motivations and thereby cause the political offense which the act of state doctrine particularly seeks to avoid), the Fifth Circuit has held that inquiry into the motivations of a foreign government is not as prohibited by the doctrine as is an inquiry into the

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[11] Compare, e.g., Hunt v. Mobil Oil Corp., 550 F.2d 68 (2d Cir.), cert. denied, 434 U.S. 984 (1977) (inquiry into a sovereign's motivations is precluded), with Compania de Gas de Nuevo Laredo, S.A. v. Entex, Inc., 686 F.2d 322, 325 (5th Cir. 1982), cert. denied, 460 U.S. 1041 (1983), and Williams v. Curtiss-Wright Corp., 694 F.2d 300, 304 n.5 (3rd Cir. 1982) (analysis of sovereign's motivations not precluded).

validity of the foreign act itself. *Compania De Gas De Nuevo Laredo, S.A. v. Entex, Inc.*, 686 F.2d 322, 325 (5th Cir. 1982), *cert. denied*, 460 U.S. 1041 (1983). The *Compania* court reasoned that an analysis of the motivations of a foreign government is necessary to determine the public nature of the foreign act: whether in fact the sovereign acted as a sovereign or whether its actions were of a commercial nature and therefore not privy to the insulation otherwise accorded an act of state. *Compania*, 686 F.2d at 326.

It stands to reason that in order to serve the interests of the act of state doctrine, rather than to permit the doctrine to become a shield by which foreign states or officials of foreign states may insulate themselves from liability for any misdeeds they commit in their private commercial dealings, the motivations behind a particular act in question must be subject to judicial scrutiny. Only in this manner can the commercial or public nature of the foreign act be determined, and the deference (or lack thereof) to be accorded it be effectuated.[12]

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[12] Even the Ninth Circuit has, in another case, addressed the importance which an analysis of a sovereign's motivation may have relative to the degree of judicial scrutiny which would necessarily follow:

> While we do not wish to impugn or question the nobility of a foreign nation's motivation, we are necessarily interested in the depth and nature of its interest. The Restatement (Second) of Foreign Relations Law of the United States §41 (1965) makes an important distinction on this basis in limiting the deference of American courts:
>
> > [A] court in the United States . . . will refrain from examining the

(Footnote continued on next page.)

In the case at bar the Ninth Circuit made no inquiry whatsoever into the motives behind Captain Hijr's order that petitioner be terminated.[13] Whether or not Captain Hijr spoke for the Saudi government is in this context of no consequence; even the government itself, by and through the Royal Commission, may have acted in a commercial capacity when it ordered that petitioner be terminated from his employment pursuant to private contract. By virtue of its summary judgment, however, the Ninth Circuit permitted no inquiry into the motives of Captain Hijr, or the private, commercial interests he served thereby.

(Footnote continued from previous page.)

> validity of an act of a foreign state by which that state has exercised its jurisdiction to give effect to its public interests. [Emphasis added.]

Timberlane Lumber Co. v. Bank of America, N.T. & S.A., 549 F.2d 597, 607 (9th Cir. 1976), cert. denied, 472 U.S. 1032 (1985). The private, commercial interests of a foreign state are not immune from the adjudicative power of the courts.

[13] In fact, no evidence was even admitted as to the reasons for Captain Hijr's order. Though in the declarations of three former employees of respondent the reasons given were the violation of Saudi law and custom, this evidence was excluded as inadmissible hearsay. Astonishingly, however, the court deemed respondent justified in terminating petitioner for cause by virtue of Captain Hijr's order that petitioner had violated Saudi law and custom. This self-contradiction was unfortunately determinative.

D. An Interlocutory Act Of A Foreign State Should Not Be Accorded Deference Pursuant To The Act Of State Doctrine.

It seems quite clear that application of the act of state doctrine to an unconsummated act of a foreign state would amount to a premature exercise of judicial deference.

> It is generally recognized that a conclusive foreign act must be completed before the doctrine is invoked. The doctrine has never been applied when it was uncertain whether a foreign expropriation has been effected. *See, e.g.*, Restatement (Second) of the Foreign Relations Law of the United States §43 comment a (1965) ("[A]ct of state doctrine . . .becomes applicable only *when and if the act has been fully executed*." (emphasis added)). Until it is shown that an officially sanctioned physical seizure has in fact occurred, or that the legal processes of expropriation have been terminated by the foreign government, partial governmental action does not necessarily result in an act of state."

Ramirez de Arellano v. Weinberger, 745 F.2d 1500, 1535 n.154 (D.C. Cir. 1984), *vacated on other grounds*, 471 U.S. 1113 (1985).

Prior to the finality of the foreign act, its very nature and import cannot be determined, thereby precluding any analysis of the applicability of the doctrine itself.

The prematurity, or actual improvidence of granting effect to the act of state doctrine prior to

the final realization of the foreign act, could be disastrous should the foreign government ultimately repudiate the previously unquestioned act. *See Dominicus Americana Bohio v. Gulf & Western Industries, Inc.*, 473 F.Supp. 680, 690 (S.D.N.Y. 1979), *citing Sabbatino*, 376 U.S. at 432 ("an act that would otherwise be immune from judicial inquiry may lose its privileged status if the government repudiates it.")

In the case at bar the Ninth Circuit summarily accorded finality to Captain Hijr's order and its attendant commercial consequence, despite the Saudi government's own apparent unwillingness to grant said order the same degree of finality. Petitioner presented evidence that Captain Hijr's order that petitioner be banished had not been endorsed by the government -- the Saudi government had in fact issued petitioner a visa for his re-entry into the kingdom. Despite the Ninth Circuit's awareness of this fact, it nevertheless applied the act of state doctrine -- by way of summary judgment -- to Captain Hijr's order.[14]

III

An Intent To Deceive Is Not A Necessary Element Of The Doctrine Of Equitable Estoppel.

It is undisputed that respondent represented in its informational pamphlets that petitioner could

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[14] The court's characterization of the evidence of Henein's right of re-entry as "collateral" is unsupported and incomprehensible. See the Ninth Circuit's Opinion, reprinted as Appendix A, at page A-9, fn. 3.

carry a prescription drug into Saudi Arabia as long as he brought the prescription itself. Allegedly, however, petitioner was ultimately terminated for possession of a prescription drug while in Saudi Arabia, notwithstanding his possession of a written prescription.

Respondent was able to terminate petitioner for cause based on petitioner's reliance on respondent's written representation, which representation (of what to do and not do in Saudi Arabia) was supposed to prevent the very result it caused.

The Ninth Circuit addressed the issue of estoppel -- whether respondent should be "estopped from relying on the act of banishment to justify the termination because [respondent] advised [petitioner] that the conduct resulting in the banishment order . . . was permissible" (Opinion at page A-14, *infra)* -- and then summarily dismissed it, based on petitioner's failure to present evidence that respondent knew or should have known that its representations were untrue.

The Ninth Circuit applied an incorrect standard in its summary adjudication of the estoppel issue. An actual intent to deceive is unnecessary to prove estoppel; rather, negligence or silence in the face of a duty to speak may suffice. *Lix v. Edwards*, 82 Cal.App.3d 573, 580, 147 Cal.Rptr. 294 (1978).

An objective view of respondent's inaccurate representation, in light of the context in which it was made, clearly justifies application of the principle that respondent should have been estopped from relying on the purported act of banishment. Surely an employer, which made to its employee an untrue written representation that the employee is permitted to bring a prescription drug into a foreign country, cannot later terminate

that employee for cause due to the employee's justifiable reliance on the written representation. There is certainly a triable issue of fact, contrary to the Ninth Circuit's summary adjudication, relative to the negligence of respondent in proffering its false representation.

IV

The Ninth Circuit Committed Reversible Error By Excluding As Inadmissible Hearsay The Admissions Of An Agent Of The Project Operated By Respondent, Which Admissions Raised A Triable Issue Of Fact In Petitioner's Negligence Claim.

The Ninth Circuit held that the evidence presented by petitioner which linked respondent to the driver and the truck involved in the accident -- evidence which formed the basis of petitioner's negligence claim -- was properly excluded by the district court as inadmissible hearsay.[15] The court misapplied the Federal Rules of Evidence.

Petitioner submitted to the court his declaration in which he attested that, while in the hospital, he was visited by officers of the project operated by

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[15] As to respondent's possessory interest in the truck, it is important to note that in this regard summary judgment was issued by virtue of the "uncontroverted" evidence submitted by respondent which disclaimed the possibility of respondent's ownership interest in the truck. No evidence, however, disproved the possibility that respondent had, for example, leased, rented or merely used the truck. See Opinion at page A-15. Summary judgment was therefore inappropriate.

respondent (Captain Hijr included) who informed him that the driver of the truck was a co-worker of petitioner.

The statement of the officer of respondent is not inadmissible hearsay, as supported by Rule 801(d)(2)(D), Fed. R. Evid., which provides in relevant part as follows:

> A statement is not hearsay if --
>
> * * *
>
> The statement is offered against a party and is . . . a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship . . . .

Interestingly, the very same evidentiary grounds upon which the Court excluded the statement of Captain Hijr informing petitioner of his co-worker's role in the accident are those evidentiary grounds upon which the Court *admitted* Captain Hijr's "order" vis-a-vis the act of state. *Compare* the Court's opinion, reprinted as Appendix A, at page A-10 and A-16.

Respondent's officer's statements regarding the accident were properly before the Court, thereby raising a triable issue of fact as to respondent's liability for the accident and precluding summary adjudication of said issue.

The Ninth Circuit's inconsistent application of the Federal Rules of Evidence must not be allowed. A published opinion cannot be permitted to stand as authority for conflicting propositions.

CONCLUSION

If the Court of Appeals' decision is allowed to stand, private concerns which engage in commerce with foreign states will be insulated from adjudication of their failure to honor their commercial obligations to third parties. The effect will be to expand the act of state doctrine beyond the bounds drawn to serve its concern for an appropriate separation of powers, and instead to transform the doctrine into a sword with which commercial entities, both private and governmental, will defeat both their own commitments and the expectations of those with whom they do business.

That the decision below was reached by summary adjudication only intensifies the troubling consequences soon to follow. Apart from adding to the confusion and conflict already existing among the circuits, the decision will shatter the well established guidance drawn by the Court that the act of state doctrine is only to be imposed upon a very careful and precise analysis of the facts, in order to assure its proper application.

The erroneous application by the Court of Appeals of the Federal Rules of Evidence, as well as the doctrine of equitable estoppel, will, if

allowed to stand, establish precedent for inconsistent and misguided future rulings.

Respectfully submitted,

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November 5, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAMAL S. HENEIN, *Plaintiff-Appellant.* v. SAUDI ARABIAN PARSONS LIMITED, an unincorporated association, *Defendant-Appellee.*	)	No. 85-6128 D.C. No. CV 82-2330-WPG OPINION

Argued and Submitted
August 6, 1986 Pasadena, California

Filed June 5, 1987

Before: Thomas Tang and Melvin Brunetti, Circuit Judges, and Bruce R. Thompson,* District Judge

Opinion by Judge Tang

Appeal from the United States District Court
for the Central District of California
William P. Gray, District Judge, Presiding

SUMMARY

Evidence/Contracts

Appeal from a grant of summary judgment to the defendants in a case arising out of the termination of an employment contract.

*Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

Appellant Gamal Henein (Henein) entered into an employment contract with Saudi Arabian Parsons Limited (SAPL) under which Henein was to perform services as an engineer in Saudi Arabia. The agreement provided that SAPL could terminate the agreement for cause, including illegal use of drugs, failure to comply with the local customs or laws of Saudi Arabia and conduct detrimental to SAPL. Informational pamphlets advised that he should carry the prescription if he brought any prescription medicine with him into the country. After working for a time in Saudi Arabia, Henein was involved in an accident when the automobile he was driving collided with a truck. He was hospitalized in Saudi Arabia, and then transported to Los Angeles to continue hospitalization. During the investigation of the automobile accident, Saudi police discovered restricted drugs in Henein's briefcase, ordered he be removed from Saudi Arabia and placed his name on a list of those prohibited from entering the country. The date on which the employment agreement was due to expire, Henein received a telegram from SAPL terminating his employment for cause. This deprived him of certain benefits to which he would otherwise have been entitled. Henein filed a complaint against SAPL seeking declaratory relief and damages for breach of contract, negligence, defamation, intentional infliction of emotional distress and misrepresentation. The district court granted SAPL's motion for summary judgment.

[1] The district court held that SAPL was entitled to discharge Henein because the Saudi government ordered his termination and banished him from the country. [2] Henein challenges as

hearsay the admissibility of three declarations of SAPL officials to establish that the Saudi government ordered him out of the country, [3] but a declaration by a supervisor that he was told by a government official to discharge Henein was not hearsay. The reason given for Henein's discharge (possession of illegal drugs) may be inadmissible hearsay if offered to prove possession of drugs, but the fact that SAPL was ordered to discharge Henein was not hearsay, but direct testimony. [4] The same principle applies to a declaration introducing internal Saudi government memoranda [5] and declarations stating that the Saudi police had ordered Henein to leave the country. [6] Since the memoranda were not offered as official records, Henein's argument that they are inadmissible because they were not properly authenticated as official foreign records is inapplicable. [7] Although the translations of the memoranda from Arabic to English were not properly authenticated, counsel for SAPL presented certifications in court. There was no error in consideration of the translations. [8] Henein could not create a genuine issue of material fact based on his evidentiary challenges to the fact of his banishment even if the challenges were well founded. Summary judgment was appropriate. [9] The contract expressly provides that Henein may be discharged for violation of local laws and uncontroverted evidence that Henein had been banished for violation of local laws and customs of Saudi Arabia. The act of the Saudi government thus constitutes a proper reason for termination under the contract. [10] If Henein's argument is construed as an argument of estoppel it still fails because he failed to produce any evidence that SAPL knew or should have known that any

of its representations were untrue. [11] Summary judgment was appropriate on the claims for breach of contract and declaratory relief.

[12] Summary judgment was appropriate for Henein's claim for negligence based on his collision with a truck he alleges was owned by SAPL because the only evidence linking SAPL to the driver of the truck was Henein's account of a conversation with Saudi officials and this account represented inadmissible hearsay. [13] Similarly, Henein failed to establish any genuine issue of material fact concerning his charges of misrepresentation, so summary judgment was appropriate on this issue.

[14] Henein's claim for intentional infliction of emotional distress is time barred because the statute was not tolled during the time in which Henein was incapacitated by his accident. The statute allows a tolling if the plaintiff is insane when the cause of action accrues, but Henein's cause of action accrued before the accident, and mere physical disability does not constitute insanity under the statute. Affirmed.

COUNSEL

Michael W. Atkin, Los Angeles, California, for the plaintiff-appellant.

William Foutz, Los Angeles, California, for the defendant-appellee.

OPINION

TANG, Circuit Judge:

Gamal S. Henein appeals a grant of summary judgment to Saudi Arabia Parsons Limited ("SAPL") on various claims arising out of the termination of Henein's employment with SAPL and out of an automobile accident that occurred during the course of that employment. The district court dismissed Henein's declaratory judgment, breach of contract and defamation[1] claims, finding his termination justified because the Saudi government ordered the termination and banished Henein from the country for violating its drug laws. The district court dismissed Henein's claims for negligence and misrepresentation because of the lack of admissible evidence, and dismissed his claim for intentional infliction of emotional distress as barred by the applicable statute of limitations. The district court found in the alternative that Henein's claims were barred by his failure to comply with certain grievance procedures provided in the employment contract. We affirm.

I. BACKGROUND

Henein is a citizen of the United States of America, residing in the Central District of California. SAPL is an unincorporated association

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[1] The dismissal of the defamation claim is not appealed.

organized under the laws of the Kingdom of Saudi Arabia. Since 1977, SAPL has performed construction management services for the Royal Commission for Jubail and Yanbu, an agency of the Saudi Arabian Government.

On April 28, 1980, Henein and SAPL entered into a written employment agreement under which Henein was to perform services as a "principal civil engineer" in Saudi Arabia from May 22, 1980 until June 30, 1981. Section 12.1.A of this agreement provided that SAPL could terminate the agreement for cause, including "illegal use of drugs, . . . failure to comply with the local customs or laws of Saudi Arabia, . . . and conduct . . . detrimental to SAPL . . ." Section 27 of the agreement provided that it constituted ". . . Employee's entire agreement with SAPL and that no promises or understandings have been made other than those stated . . . [and that] this Agreement shall be subject to modification only by written instrument signed by both SAPL and the Employee."

Prior to executing the contract, Henein was given two informational pamphlets by SAPL. These materials apprised Henein of what to expect in Saudi Arabia, contained information about what he might wish to bring, and advised him that he should carry the prescription if he brought any prescription medicine with him into the country.

On May 14, 1981, Henein was involved in an accident when the automobile he was driving collided with a truck. Henein was hospitalized in Saudi Arabia for extensive injuries. Approximately

two weeks after the accident, Henein was transported to Los Angeles where he continued his hospitalization.

During the investigation of the automobile accident, Saudi police discovered restricted drugs in Henein's briefcase in his automobile. The Saudi officials ordered that Henein be removed from Saudi Arabia, his employment terminated, his passport turned over to Saudi authorities, and his name placed on the list of those prohibited from entering Saudi Arabia.

On June 30, 1981, the date on which the employment agreement was due to expire, Henein received a telegram from SAPL that his employment was terminated for cause. The termination for cause deprived Henein of certain benefits to which he would otherwise have been entitled.

On May 13, 1982, Henein filed a complaint against SAPL in district court seeking declaratory relief and damages for breach of contract, negligence, defamation, intentional infliction of emotional distress, and misrepresentation. The complaint was amended on January 3, 1983. SAPL appeared to contest service and moved to dismiss for lack of in personam jurisdiction. The district court denied the motion.[2] On July 9, 1984, the district court granted summary judgment in favor

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[2] SAPL does not contest the district court's finding of in personam jurisdiction in this appeal.

of SAPL on Henein's declaratory judgment, breach of contract, and defamation claims. On June 24, 1985, the district court granted summary judgment in favor of SAPL on Henein's negligence, intentional infliction of emotional distress, and misrepresentation claims. The district court also denied Henein's motion for reconsideration of its earlier summary judgment ruling. Final judgment was entered on July 16, 1985. Henein timely appealed on July 19, 1985.

II. QUESTIONS PRESENTED

A. Did the district court err in finding Henein's termination to be justified under the terms of his employment contract?

B. Did the district court err in finding that there was no admissible evidence to support Henein's negligence and misrepresentation claims?

C. Did the district court err in dismissing Henein's claim for intentional infliction of emotional distress?

III. ANALYSIS

This court reviews the grant of summary judgment de novo. *Planet Insurance v. Mead Reinsurance Corp.*, 789 F.2d 668, 670 (9th Cir. 1986). "Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Id.* California law controls the substantive issues in this diversity case.

A. Did the district court err in finding Henein's termination to be justified under the terms of his employment contract?

[1] The district court held that SAPL was entitled to discharge Henein, pursuant to the unambiguous terms of his employment contract, because the Saudi Arabian government ordered his termination and banished him from the country following the discovery of restricted drugs in his automobile. Henein argues: (1) that SAPL failed to introduce admissible evidence of the Saudi government's banishment order; and (2) that SAPL should not be permitted to rely on the banishment order to justify the termination.

1. *Evidence of the Act of Banishment*

SAPL relied on the declarations of three of its supervisory employees, Ronald L'Hommedieu, David Holleman, and John Mewha, to establish that Saudi Arabia ordered SAPL to terminate Henein's employment and banished Henein from the country. SAPL also relied on Henein's tacit admission that he had been banished in the form of Henein's request that SAPL intercede on his behalf with the Saudi government. Henein produced no evidence disputing these facts;[3] instead, Henein challenges the admissibility of

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[3] Henein did submit evidence tending to show that he has not been barred from reentering Saudi Arabia, a collateral matter raised in the declarations.

SAPL's evidence. We find sufficient admissible evidence of the Saudi government's acts to support summary judgment in this case.

[2] Henein first challenges the admissiblity of the declarations as hearsay. Under Fed. R. Evid. 801, hearsay "is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted." Hearsay is inadmissible in a court of law unless it comes under one of the exceptions set forth in Fed. R. Evid. 803. *Haddad v. Lockheed California Corp.*, 720 F.2d 1454, 1456 (9th Cir. 1983). "The hearsay rule does not operate to render inadmissible every statement repeated by a witness as made to another person. It does not exclude evidence offered to prove the fact that a statement was made, rather than the truth [of the statement]." *United States v. Anfield*, 539 F.2d 674, 678 (9th Cir. 1976).

[3] The L'Hommedieu declaration states that a Saudi official with the title of Security Coordinator, Captain Yousif Hijr, told L'Hommedieu to discharge Henein and demanded that SAPL surrender Henein's passport. This is not hearsay. The *reason* given by Hijr, Henein's possession of illegal drugs, may be inadmissible hearsay if offered to prove that Henein did in fact possess such drugs, but the fact that SAPL was ordered by a Saudi official to discharge Henein and to insure that Henein leaves the country is certainly not hearsay -- it is direct testimony about an act performed by the Saudi government.

[4] The Holleman declaration introduces internal Saudi government memoranda given to Holleman by Hijr. The same principle applies. The *contents* of the memoranda may or may not be truthful and are inadmissible if offered for the truth of the matters stated therein, but the fact of their receipt is admissible to establish that SAPL believed that the Saudi government had ordered Henein's termination and expulsion from the country. *See Jones v. Los Angeles Community College District*, 702 F.2d 203, 205 (9th Cir. 1983).

[5] The Mewha declarations state that Mewha was informed that the Saudi police had ordered Henein to leave the country because Henein possessed restricted drugs, that after the termination SAPL made inquiries of the Saudi government on Henein's behalf, and that the reason for Henein's discharge was the order of the Saudi government. A letter Mewha received from a Saudi official verifying that Henein would not be permitted to return is attached to one of the declarations. Unlike L'Hommedieu, Mewha does not testify based on personal knowledge to any conduct by the Saudi government prior to the termination. Mewha's declarations are admissible, however, to show the reason for the termination, that Henein had requested SAPL's assistance in convincing the Saudi government to reconsider its determination, and that Henein would not be permitted to return to Saudi Arabia.

[6] Henein next argues that the memoranda are inadmissible because they were not properly authenticated as official foreign records under Fed. R. Civ. P. 44(a) and Fed. R. Evid. 901 and

902(3). The memoranda were not offered as official records, and the rules cited by Henein are simply inapplicable.

[7] Henein further argues that the translations of the memoranda from Arabic to English were not properly authenticated. There is no signature of the translator on either document, nor does either document contain a statement that the translation is accurate and complete. Henein is correct that the translations as presented in SAPL's moving papers were thus technically improper, but the transcript of oral argument on the motion reveals that counsel for SAPL presented certifications of the translations to the court at that time.[4] At oral argument on the motion, Henein's counsel further conceded that the substance of the translations was correct, although he did dispute the meanings of selected words. While we do not approve of the slipshod presentation by SAPL's counsel, we can find no error in the district court's consolidation of the translations.

[8] Finally, we note that Henein could not create a *genuine* issue of material fact based on his evidentiary challenges to the fact of his banishment even if such challenges were well founded. The Mewha supplemental declaration explains that, after the termination, Henein sought SAPL's help in overturning the Saudi government's determination that he had possessed illegal drugs. Henein's own

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[4] The certifications themselves are not in the record.

undisputed conduct thus establishes that there is no real dispute whether the Saudi government had decided that Henein had violated its laws and customs. Summary judgment was appropriate.[5]

2. *Whether SAPL should have been permitted to rely on the banishment order to justify Henein's termination*

[9] Henein argues that SAPL should not have been permitted to rely on the Saudi government's banishment order to justify his termination because SAPL had advised him that it was legal to possess drugs in Saudi Arabia under a valid prescription. Henein argues, without citation to authority, the SAPL's advice is binding "and that the act of state doctrine may not be imposed as an excuse for non-payment of defendant's monetary obligations under the employment contract."

Henein is incorrect. Section 12.1.A of the contract expressly provides that Henein may be

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[5] The parties devote considerable attention to the question whether the banishment order constitutes an "act of state" and whether the district court should have considered disputed evidence about the accuracy of the Saudi government's determination. These matters are completely irrelevant to this dispute. Even if Henein had conclusively established that the Saudi government's orders were incorrect and that he was not in possession of illegal drugs, SAPL would still have been bound by the Saudi decree and entitled to discharge Henein under the express terms of the employment contract.

discharged for violation of the local laws and customs of Saudi Arabia. SAPL presented uncontroverted evidence that Henein had been banished for violation of the local laws and customs of Saudi Arabia and that he was discharged for this reason. The act of the Saudi government thus constitutes a proper reason for termination under the contract.

[10] At best, although not framed in this manner or properly pleaded, Henein's argument might be construed as a contention that SAPL should be *estopped* from relying on the act of banishment to justify the termination because SAPL advised him that the conduct resulting in the banishment order possession of restricted drugs was permissible. SAPL's only representations concerning drugs appear to be two lines in the informational pamphlets given to Henein advising him that he could bring prescription medicine into Saudi Arabia and that he should also carry the prescription itself. This is plainly insufficient to establish an estoppel as Henein presented no evidence that SAPL knew or should have known that its representations concerning prescription drugs were untrue. *See In re Lisa R.*, 13 Cal.3d 636, 645, 119 Cal.Rptr. 475, 480-81, *cert. denied*, 421 U.S. 1014 (1975); Cal. Evid. Code § 623.

[11] Summary judgment was appropriate on the claims for breach of contract and declaratory relief.[6]

B. Did the district court err in finding no admissible evidence to support Henein's negligence and mispresentation claims?

1. *Negligence*

Henein's claim for negligence arises from his collision with a truck he alleges was owned by SAPL and driven by a SAPL employee. The district court found no evidence to support the claim because Henein could not connect either the driver or the truck to SAPL. On appeal, Henein argues that summary judgment was impermissible because the district court improperly weighed conflicting evidence.

SAPL offered uncontroverted evidence that it was not the owner of the truck. SAPL presented the declarations of Fred Taeger, who had arrived at the scene shortly after the accident, that the truck was a large Mercedes tandem-rear-axles

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[6] Henein also contends that the district court erred in failing to reconsider its written order dismissing the entire breach of contract claim, rather than simply adjudicating whether SAPL had the right to terminate Henein as the court had indicated in its oral ruling on the motion. All of Henein's contract claims depend on a determination that he was terminated without cause. The motion for reconsideration was properly denied.

truck designed for hauling aggregates such as sand or gravel. Taeger further stated that the truck did not bear SAPL's logo on its side. SAPL also offered the declaration of Karl Talpai, acting manager of transportation at SAPL, that SAPL owned no truck larger than a pick-up truck in its entire fleet. When deposed, Henein had also stated that he collided with a "very big" truck of the type used for hauling aggregates.

[12] Henein's only evidence linking SAPL to the driver and the truck was his own account of a conversation he had with Saudi government officials while he was in the hospital in Saudi Arabia. Henein states that he was visited by Saudi officials who asked him to forgive the driver of the other vehicle and who told him that the other driver was one of his "co-workers." The district court found that Henein's declaration was "complete" hearsay because the declarants were not in court and it was offered to prove as true a connection between SAPL and the driver. This ruling was correct. Fed. R. Evid. 801, 803. There was no improper weighing of the evidence; Henein's only evidence was properly excluded. Summary judgment was appropriate.

2. *Misrepresentation*

In his complaint, Henein alleged that SAPL had made fraudulent representations to him regarding (1) his housing in Saudi Arabia; (2) the nature of his duties; and (3) working conditions in Saudi Arabia. Under California law, the elements of a cause of action for intentional misrepresentation are:

> (1) A promise made regarding a material fact without any intention of performing it; (2) the existence of the intent at the time of making the promise; (3) the promise was made with intent to deceive or with intent to induce the party to whom it was made to enter into the transaction; (4) the promise was relied on by the party to whom it was made; (5) the party making the promise did not perform; (6) the party to whom the promise was made was injured.

Muraoka v. Budget Rent-A-Car, Inc., 160 Cal.App.3d 107, 119, 206 Cal.Rptr. 476, 482 (1984). The district court dismissed Henein's misrepresentation claims because he failed to introduce any admissible evidence of a prima facie case of misrepresentation.

Henein argues that the district court improperly excluded evidence of promises made outside of the employment contract, some of which were oral and most of which were contained in the pamphlets given to Henein by SAPL. Section 27 of the employment agreement between SAPL and Henein states that the contract constitutes ". . . Employee's entire agreement with SAPL and that no promises or understandings have been made other than those stated . . . [and that] this agreement shall be subject to modification only by written instrument signed by both SAPL and the Employee." The employment agreement is clear on its face and the district court properly excluded Henein's testimony concerning promises extrinsic to the fully integrated contract under the parol

evidence rule. *See Telco Leasing, Inc. v. Transwestern Title Co.*, 630 F.2d 691, 693 (9th Cir. 1980); *Sullivan v. Massachusetts Mutual Life Insurance Co.*, 611 F.2d 261, 263-65 (9th Cir. 1979).

[13] In any event, Henein failed to establish any genuine issue of material fact concerning other elements of a claim for misrepresentation. No evidence was submitted on SAPL's intent to deceive, nor did Henein establish that he relied on the representations. Summary judgment was appropriate.

F. Did the district court err in dismissing Henein's claim for intentional infliction of emotional distress?

Henein claims SAPL intentionally inflicted emotional distress upon him by: (1) wrongfully threatening him with termination of his employment contract; (2) materially and unilaterally changing the nature of his employment agreement; (3) forcing him to live with a person known to be violating the laws of Saudi Arabia; and (4) restricting his freedom of travel by wrongfully detaining his passport. All of these alleged acts occurred before the automobile accident and more than one year prior to the filing of the complaint. The district court held the claim time barred under section 340(3) of the California Code of Civil Procedure.

[14] On appeal, Henein argues that the statute was tolled under section 352(a) of the California Code of Civil Procedure because he was incapacitated by the accident. Section 352(a) provides: "If a person entitled to bring an action,

mentioned in Chapter 3 of this title, be, at the time the cause of action accrued . . . insane . . . the time of such disability is not a part of the time limit for commencement of the action." Henein does not allege that he was incapacitated at the time the cause of action *accrued*; i.e., at the time SAPL is alleged to have done the acts constituting intentional infliction of emotional distress. *See Larsson v. Cedars of Lebanon Hospital*, 97 Cal.App.2d 704, 218 P.2d 604, 606 (1950). Moreover, "mere physical disability or nervous shock following an accident" do not constitute insanity under the statute. *Baker v. Beech Aircraft Corp.*, 39 Cal.App.3d 315, 322, 114 Cal.Rptr. 171, 176 (1974). The statute therefore was not tolled. Henein's claim for intentional infliction of emotional distress is time barred.[7]

CONCLUSION

The judgment of the district court is **AFFIRMED**.

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[7] In view of the foregoing, we do not reach the question whether Henein's claims are independently barred by his failure to comply with the grievance procedures provided in the employment contract.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GAMAL S. HENEIN,	No. 85-6128
Plaintiff-Appellant,	D.C. # CV 82-2330-WPG
v.	
SAUDI ARABIAN PARSONS LIMITED, an unincorporated association,	ORDER DENYING PETITION FOR REHEARING
Defendant-Appellee.	

Before: TANG and BRUNETTI, Circuit Judges and B. THOMPSON,* District Judge.

The panel has considered the appellant's Petition for Rehearing. The Petition for Rehearing is denied.

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* Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation

APPENDIX C

FRED G. BENNETT
SCOTT E. WOOD
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GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, California 90071
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Attorneys for Defendant
Saudi Arabian Parsons Limited

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

GAMAL S. HENEIN, Plaintiff, v. SAUDI ARABIAN PARSONS LIMITED, an unincorporated association, Defendant.	CIVIL NO. 82-2330-WPG SUMMARY JUDGMENT OF DISMISSAL IN FAVOR OF DEFENDANT SAUDI ARABIAN PARSONS LIMITED ~~[PROPOSED]~~ WP Date: June 24, 1985 Time: 10:00 a.m. Place: Courtroom of Hon. William P. Gray

~~WHEREAS,~~ ~~d~~Defendant Saudi Arabian Parsons Limited has moved the Court for summary judgment; WH and

WHEREAS, The Court has considered all of the evidence, briefs, oral argument and other matters of which judicial notice was requested submitted on behalf of all parties; and

WHEREAS, Plaintiff's action is based on an employment agreement of August 28, 1980 and upon alleged negligence and other alleged tortious conduct of defendant in connection with plaintiff's employment; and

WHEREAS, There is no evidence to support plaintiff's negligence claim ~~as a matter of law~~; the only evidence before this Court indicates that that claim is wholly without merit and subject to summary dismissal at this time; and *WPG*

WHEREAS, Plaintiff's claims for intentional infliction of emotional distress ~~is~~ are barred by the applicable statute of limitations, California Code of Civil Procedure §340(3); and *WPG*

WHEREAS, Plaintiff's claims for intentional infliction of emotional distress ~~is~~ are additionally barred by plaintiff's failure to allege the type of outrageous behavior which the courts of California have required in order to permit recovery for emotional distress; and

WHEREAS, Plaintiff's claim for misrepresentation is without merit because plaintiff's employment contract constitutes an integrated written document, and this claim, based on alleged oral representations antedating the signing of that document, is barred by the Parole Evidence Rule; and *WPG*

WHEREAS, Plaintiff has been unable to offer any evidence establishing the elements of a prima facie claim for misrepresentation under California law, and this claim is subject to summary dismissal upon that ground; and *WPG*

WHEREAS, Each of plaintiff's claims is additionally and independently barred by the failure of plaintiff to comply with the grievance notice procedures explicitly required by his employment contract, such

compliance being a condition precedent to pursuit of any legal remedy by plaintiff based on claims arising out of his employment with SAPL or the termination thereof; and

WHEREAS, This Court, having found each of plaintiff's claims to be without legal or factual merit;

NOW, THEREFORE, this action is dismissed with prejudice as against defendant Saudi Arabian Parsons Limited.

DATED: June 25, 1985

/s/ William P. Gray
Hon. William P. Gray
United States District Judge

APPENDIX D

No. A-273

GAMAL S. HENEIN,

Applicant,

v.

SAUDI ARABIAN PARSONS LIMITED

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 5, 1987.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court of the United States

Dated this 6th day of October, 1987.

APPENDIX E

EXCERPTS FROM EMPLOYMENT AGREEMENT

ARTICLE 1. BASIC DATA

A. POINT OF ORIGIN/COUNTRY OF ORIGIN:
Los Angeles, CA./U.S.A.

B. CLASSIFICATION:
Principal Civil Engineer

C. EMPLOYMENT PERIOD*:
18 months

D. EFFECTIVE DATE OF THIS AGREEMENT:
May 20, 1980

E. COMPLETION DATE*:
Nov. 20, 1981

* See particularly Sections 1, 12, and 25.6 of Attachnent A.

* * *

Initialed by:
Employee /s/ GH
SAPL /s/ CWR

SECTION 12. TERMINATION

12.1 For Cause or Resignation

A. SAPL, at its discretion, may at any time terminate Employee's employment hereunder for cause, such as breach of this Employment Agreement; incompetence; intoxication; illegal use of drugs; insubordiation; any violation of any rule or regulation that may be established from time to time by SAPL or by the Client for the Employee's conduct of work or the conduct of business; failure to comply with the local customs or laws of Saudi Arabia; or for any failure of Employee to perform any agreement, duty or obligation of Employee under this Agreement; or conduct of any dependent or guest of Employee in the country of the Employment Location which is detrimental to SAPL, the Client, the work, or the project; or for any other cause of similar nature authorized by applicable law. If such termination is subsequently determined by SAPL or appropriate judicial authority not to be termination for cause, then termination shall be deemed to be a termination for other lawful cause under Section 12.2.

Initialed by:
Employee /s/ GH
SAPL /s/ CWR

B. If Employee's Employment hereunder is terminated for cause by SAPL as authorized in Section 12.1.A, or if Employee resigns, Employee shall be paid Monthly Salary and Cost of Living Differential to date of termination and for such unused accrued vacation to which Employee may then be otherwise entitled hereunder, and shall be given return air tickets for Employee and Authorized Dependents to Point of Origin (or to Employee's choice of destination outside of Saudi Arabia at no greater cost), but shall not be deemed to have achieved Satisfactory Completion of Employment nor be entitled to any severance allowance or bonus or to any return relocation or shipping allowances, per diem, travel expenses or other allowances payable upon termination of this employment, or otherwise payable hereunder. If such resignation or termination occurs before Employee has completed a minimum of 6 months of Employment, Employee shall be responsible for providing at Employee's sole expense, return transportation for Employee and Employee's Authorized Dependents, including their personal and household effects, to Point of Origin. If, under the above circumstances, SAPL, for any reason, including but not limited to

Initialed by:
Employee /s/ GH
SAPL /s/ CWR

applicable law, must pay for Employee's or Employee's Authorized Dependents' return transportation, such payment shall be considered a salary advance to Employee, and Employee agrees to be liable to SAPL for such costs. Any such amount shall be withheld from final settlement and any remaining excess shall be repaid as provided in Section 26.

12.2 Other Lawful Reason - Satisfactory Completion of Employment

A. SAPL, in its discretion (i.e., for any other lawful reason not described in Section 12.1.A above), at any time, may terminate Employee's employment hereunder by not less than 30 days written notice. For purposes of this Section, Employee agrees that "other lawful reason" shall include: total or partial completion of SAPL's work under the Prime Contract or total or partial completion of the work thereunder which Employee was hired to perform; total or partial suspension by the Client or SAPL of SAPL's work under the Prime Contract or of the work which Employee was hired hereunder to perform; reduction in force directed by the Client; or, at any time during the Probationary Period by 15

Initialed by:
Employee /s/ GH
SAPL /s/ CWR

days Notice, if in the judgment of SAPL or the Client, for reasons other than described in Section 12.1.A above, Employee is found not sufficiently qualified or experienced for the work for which Employee was hired or is deemed otherwise not suitable for employment on the Yanbu Project.

B. If during the Period of Employment, the Client should direct that there be a revision of salary, benefits or allowances herein provided, except as provided in Section 5, to be payable to Employee which is detrimental to Employee, the Employee may notify SAPL that unless Employee and SAPL shall mutually agree in respect of any such revision within 14 days after notification to Employee of any such intended change, Employee will elect to terminate employment hereunder. In the event Employee elects to terminate, this agreement shall be deemed terminated by mutual agreement.

C. In the event of termination under Section 12.2, Employee shall be deemed to have achieved Satisfactory Completion of Employment.

Initialed by:
Employee /s/ GH
SAPL /s/ CWR